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No. 93-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTH CAROLINA ASSOCIATION OF ELECTRONIC TAX FILERS, INC. and ROCKET REFUND, INC.,
Petitioners,

v.

WILLIAM T. GRAHAM, COMMISSIONER OF BANKS, NORTH CAROLINA BANKING COMMISSION,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court of North Carolina

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the national system of federal income tax regulation preempt the North Carolina Refund Anticipation Loan Act pursuant to the Supremacy Clause of the United States Constitution?

2. Does the North Carolina Refund Anticipation Loan Act Violate the Commerce Clause of the United States Constitution?

PARTIES IN THE COURT BELOW

All parties in this matter are set forth in the caption.

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NO. 93 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NORTH CAROLINA ASSOCIATION OF ELECTRONIC TAX FILERS, INC. AND ROCKET REFUND, INC.,

Petitioners,

vs.

WILLIAM T. GRAHAM, COMMISSIONER OF BANKS, NORTH CAROLINA BANKING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioners, the North Carolina Association of Electronic Tax Filers, Inc. and Rocket Refund, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this

proceeding on May 7, 1993.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 333 N.C. 555, 429 S.E. 2d 544 (1993) and is set out in the appendix to this petition at pages 1a-33a. The judgment of the Superior Court of Wake County, North Carolina dismissing the case on summary judgment is set out in the appendix at pages 34a-36a.

JURISDICTION

The judgment and opinion of the Supreme Court of North Carolina affirming the Court's dismissal of the case was entered on May 7, 1993. On July 7, 1993, Chief Justice Rehnquist entered an Order extending the time for filing a petition for writ of certiorari to and including Saturday, September 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article VI, Clause 2 of the United States Constitution, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

This code also involves Article I, Section 8, Clause 3 of the United States Constitution, which states:

> Sec. 8, Cl. 3. Power of Congress to regulate commerce. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The North Carolina Refund Anticipation Loan Act, N.C.G.S. §§ 53-245 to 53-254, is set out in the Appendix at pp. 36a-46a.

STATEMENT OF THE CASE

1. PROCEEDINGS BELOW

The petitioners, the North Carolina Association of Electronic Tax Filers, Inc. and Rocket Refund, Inc., brought this action on January 2, 1992, in the Superior Court Division of the General Court of Justice in Wake County, North Carolina, against William T. Graham, Commissioner of Banks, North Carolina Banking Commission. This Declaratory Judgment action was brought pursuant to Rule 57 of the North Carolina Rules of Civil Procedure, and alleged that the North Carolina Refund Anticipation Loan Act, N.C.G.S. 53-245 to 53-254, is unconstitutional in that it violates the Supremacy Clause and the Commerce Clause of the United States Constitution.

The case was heard on a motion for summary judgment on February 12, 1992, and

an Order of Dismissal was entered on February 14, 1992 granting summary judgment in favor of the respondent, and denying petitioners' motion for summary judgment. Petitioner gave Notice of Appeal to the North Carolina Court of Appeals on March 5, 1992. On June 23, 1992, the Petitioner filed a Petition for Discretionary Review with the Supreme Court of North Carolina prior to a determination by the North Carolina Court of Appeals. The Petition for Discretionary Review was allowed on July 16, 1992. On May 7, 1993 the Supreme Court of North Carolina filed its Opinion affirming the lower court, and holding that the North Carolina Refund Anticipation Loan Act does not violate the Supremacy Clause and Commerce Clause of the United States Constitution.

2. STATEMENT OF FACTS

In 1986, the Internal Revenue Service of the United States established a national program for the electronic filing of federal income tax returns. 26 U.S.C. § 6011(e). Since the beginning of this program, the Internal Revenue Service has promulgated numerous rules for electronic tax filers. Revenue Procedures 90-62, 91-69, 93-8. In addition, the basis for the Internal Revenue Procedures is found in federal regulations promulgated by the Secretary of the Treasury. 26 CFR 601.602; Part 1, Sections 6012, 6061: 1.6012-5, and 1.6061-1. Revenue Procedure 90-62 is entitled "Obligations of Participants in the Electronic Filing Program for Form 1040, U.S. Individual Income Tax Return."

As a result of the Internal Revenue System's Electronic Tax Filing Program, a new industry of electronic tax filers

sprang up in North Carolina and throughout the nation. The North Carolina Association of Electronic Tax Filers, Inc. is comprised of electronic tax filers in North Carolina who are participants in this federal program. One of these members is Rocket Refund, Inc.

The Electronic Filing Program of the Internal Revenue Service involves two primary areas of regulation: (1) the electronic filing of federal tax returns and (2) tax refund loans (known as RALs), which provide taxpayers with quick refunds after they file their federal tax returns electronically.

On October 1, 1990, North Carolina General Statutes §§ 53-245 to 53-254, entitled "Refund Anticipation Loan Act" went into effect. The Act seeks to regulate tax refund loans (RALs) and mandates registration of all tax preparers

in North Carolina who desire to participate as facilitators in the electronic filing of federal tax returns and tax refund loans. The Act requires the payment of registration fees for each facilitator's business locations. The Act provides civil and criminal penalties, and sets forth disclosure requirements, and seeks to regulate the tax refund loan process by facilitators (tax preparers) in North Carolina. The Commissioner is given broad powers to carry out the purposes of the Act.

As it applies to members of the Association and other electronic tax filers, the process of the electronic filing of federal tax returns and tax refund loans includes the following: (1) the taxpayer enters a collection center, leaves his completed tax return, and fills out IRS Form 84533 and a Disclaimer. If he

is applying for a refund anticipation loan, he will also fill out an RAL Application. Those taxpayers receiving an RAL loan will return within five to seven days to pick up their net refund check. (2) The data center will enter the return into the computer and transmit the information to a service bureau. The service bureau will then transmit the information to the IRS and a national out-of-state bank providing the RAL loan. If the IRS and the bank approve the amount, the data center is then given authority to cut a check to the taxpayer. The courier service returns the check to the collection center, and the taxpayer returns to the collection center to receive the refund. Approximately ninety percent (90%) of those individuals in North Carolina who electronically file federal income tax returns also apply for the refund anticipation loans.

REASONS FOR GRANTING THE WRIT

This case presents important and novel constitutional questions involving federal income tax and national banking policy. The Writ of Certiorari should be granted because of the following compelling issues of national importance.

First, electronic filing of federal income tax returns has been described by the Internal Revenue Service as "the wave of the future," with the specific desire "that electronic filing will be the standard filing format by the end of the century." Internal Revenue Service Announcement 92-153 (Oct. 26, 1992) Today millions of taxpayers are using the electronic filing process. As of the 1991 filing year, 417,230 federal tax returns were electronically filed by North Carolina citizens. The Internal Revenue Service actively promotes electronic filing of

federal tax returns in every state.

Second, the North Carolina Refund Anticipation Loan Act constitutes a direct barrier to the participation by tax preparers in the national program of electronic filing of federal tax returns. The Internal Revenue Service has established three criteria for participation in this national program. However, North Carolina has established additional and different requirements for tax preparers in that state. This has created a conflict in regulation. A tax preparer may be approved by the Internal Revenue Service to do electronic tax filing, and yet be precluded from doing so by the North Carolina Act. Such state regulation significantly interferes with the methods by which the federal system was designed to meet its goals. In addition, the North Carolina Act gives the state

Banking Commissioner the authority to regulate fees, which conflicts with the free market approach taken by the Internal Revenue Service.

Third, the ramifications of the North Carolina Act on the comprehensive federal tax system are significant. If each state were to adopt such an approach, it would undermine the comprehensive and uniform federal scheme of regulation and create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude. This would result in chaos, and the frustration of the federal tax system.

Fourth, an important part of the Internal Revenue System's Electronic Filing Program is regulation of tax refund loans. These loans are made by out-of-state national banks. No banks in North Carolina are involved in making tax refund loans to

citizens of that state. There is no electronic filing of state tax returns in North Carolina. The North Carolina Act directly and inextricably effects interstate commerce. In addition, federal tax policy has historically been the exclusive domain of the federal government from the beginning of this nation.

Finally, the Opinion of the Supreme Court of North Carolina conflicts with a long line of decisions from this Court with respect to the Supremacy Clause and the Commerce Clause of the United States Constitution. The Opinion ignores field preemption and conflict preemption, and the practical effects of the Act on interstate commerce. Furthermore, the Supreme Court of North Carolina has decided an important federal constitutional question, which has not been, but should be settled by this Court.

I.

THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING PRE-EMPTION.

A. This Court Has Enunciated The Standards To Be Used In Determining Pre-emption.

This Court has long held that preemption may be either expressed or implied, and "is compelled whether Congress' command is explicitdly stated in the statute's language or implicitly contained in its structure and purpose." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Fidelity Federal Savings and Loan Assn. v. De la Cuesta, 458 U.S. 141, 152-153 (1982). Absent explicit pre-emptive language, this Court has recognized two types of implied pre-emption: field pre-emption and conflict pre-emption.

Field pre-emption occurs where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,'" Id. at 153 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). Conflict pre-emption occurs where "compliance with both federal and state regulations is a physical impossibility," Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz 312 U.S. 52, 67 (1941); Felder v. Casey, 487 U.S. 131, 138 (1988); Perez v. Campbell, 402 U.S. 637, 649 (1971).

In Rice, the Illinois Commerce Commission sought to regulate the grain warehouse business. Rice, as owner and

shipper of grain, filed with the Illinois Commerce Commission a complaint charging respondent warehouse owners with violations of the Illinois Public Utility Act, the Illinois Grain Act and Article 13 of the Illinois Constitution. The violations alleged included operation without a state license, execution of unreasonable rates, failure to publish rates, failure to provide appropriate facilities, improper mixing of grades, discrimination in rates and conflict of interests as grain dealer and warehouseman.

This Court held that the Warehouse Act as amended by Congress in 1931 preempted the enforcement of the Illinois statutes in that the Amendments to the Warehouse Act sought to achieve fair and uniform business practices. Congress had formulated a policy on numerous phases of the warehouse business. Under the Act, the Secretary of

Agriculture had the right to suspend or revoke businesses. He also had the right to determine whether warehouses of applicants or licensees were suitable.

This Court concluded that if a warehouseman complied with federal requirements, he did all he need do. "He could not be required by a state to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act." Id. at 236.

In Rice, this Court emphasized at p. 236:

> The test, therefore, is whether the matter on which the state asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.

Ray v. Atlantic Richfield Co., 435 U.S. 151(1978) involved federal regulations

promulgated by the Secretary of the U.S. Department of Transportation. Section 391(5) of the Ports and Waterways Safety Act of 1972 provided for inspection of vessels for compliance with the Secretary's safety regulations. Title II also directed the Secretary to inspect tank vessels for compliance with regulations which he is required to issue for the protection of the marine environment. §391 a(6).

The State of Washington enacted a state statute known as the Tanker Law, which sought to regulate in particular aspects of the design, size and movement of oil tankers in Puget Sound. This Court held that the state was preempted by the federal Act. In so holding, this Court noted that the Act had entrusted to the Secretary the duty of determining which oil tankers were sufficiently safe to be allowed to proceed in the navigable waters

of the United States.

This Court concluded at p. 193:

> Refusing to accept the federal judgement, however, the State now seeks to exclude from Puget Sound vessels certified by the Secretary as having acceptable design characteristics, unless they satisfy the different and higher design requirements imposed by state law. The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment. Enforcement of the state requirement would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers.

In Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 (1982), the issue before the Court was the pre-emptive effect of a regulation, issued by the Federal Home Loan Bank Board, permitting federal savings and loan associations to use "due-on-sale" clauses

in their mortgage contracts. The Federal Home Loan Bank Board, pursuant to Congressional authorization, has the authority to promulgate regulations governing the powers and operations of every Federal savings and loan association from its cradle to its corporate grave. In 1976, the Board issued a regulation governing due-on-sale clauses (12CFR §545.8-3(f)). The Plaintiffs contended that Fidelity's exercise of the due-on-sale clause violated California's prohibition of unreasonable restraints on alienation under Cal. Civ. Code Ann §711. (West 1982).

This Court focused on the pre-emptive effect of federal regulations promulgated by a federal agency with broad powers. First, this Court noted that "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude

enforcement of state laws on the same subject." Id. at 153; Rice v. Santa Fe Elevator Corp., supra. at 230. Second, the broad language of § 5(a) of the Home Owner's Loan Act expressed no limits on the Board's authority to regulate the lending practices of federal savings and loans. Third, Congress delegated to the Board broad authority to establish and regulate a uniform system of savings and loan institutions where there are not any now, and to establish them with the force of government behind them, with a national charter. This Court noted that the Board had exercised that discretion, regulating comprehensively the operation of these associations, including their lending practices and specifically, the terms of loan instruments.

In Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), this Court held

that Federal Communications Commission regulations pre-empted the State of Oklahoma from requiring cable television operators in Oklahoma to delete all advertisements for alcoholic beverages contained in the out-of-state signals that they re-transmit by cable to their subscribers. Quoting with approval the language in Fidelity Federal Savings and Loan Assn. v. De la Cuesta, supra. at 153-154, this Court stated:

> "Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited: 'If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care

> by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" Quoting United States v. Shimer, 367 U.S. 374, 383 (1961).

This Court has also clearly enunciated the tests to be used in determining conflict pre-emption. In Hines v. Davidowitz, supra., the Court was called upon to decide whether the federal Alien Registration Act pre-empted the Alien Registration Act adopted by the Commonwealth of Pennsylvania. In holding that the Pennsylvania statute was pre-empted by the federal Act, the Court said:

> Our principal function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is

> of importance that the legislation is in a field which effects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.

In Morales v. Trans World Airlines, Inc., ____ U.S. ____, 112 S. Ct. 2031 (1992), this Court held that the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1301 et. seq. pre-empted the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes. The question of whether there was implied pre-emption was held to be one of statutory intent. This Court noted that "we accordingly 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" FMC Corp. v. Holliday, 498 U.S.

_____, at _____, 111 S. Ct., at 407; Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194, 105 S. Ct. 658, 661-662, 83 L. Ed. 2d 582 (1985). In addressing the similarity between the Airline Deregulation Act and the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a), this Court stated at p. 2037:

> True to our word, we have held that a state law "relates to" an employee benefit plan, and is pre-empted by ERISA, "if it has a connection with or reference to such a plan." Shaw, supra., 463 U.S., at 97, 103 S. Ct., at 2900. Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline "rates, routes, or services" are pre-empted under 49 U.S.C. App. § 1305(a)(1).

In Gade v. National Solid Wastes Management Ass'n, ____ U.S. ____, 112 S. Ct. 2374 (1992), a trade association brought a declaratory judgement action to

enjoin the Illinois Environmental Protection Agency from enforcing Illinois laws providing for training, testing and licensing of hazardous waste site workers. This Court held that the state regulation of occupational safety and health issues which has not been approved by the Secretary of Labor, and for which the federal standard is in effect, is impliedly preempted as in conflict with the full purposes and objectives of the Occupational Safety and Health Act.

This Court stated at p. 2385:

> In determining whether state law "stands as an obstacle" to the full implementation of a federal law, Hines v. Davidowitz, 312 U.S. at 67, 61 S. Ct., at 404, "it is not enough to say that the ultimate goal of both federal and state law" is the same. International Paper Co. v. Ouellette, 479 U.S. 481, 494, 107 S. Ct. 805, 813, 93 L. Ed. 2d 883 (1987). "A state law also is pre-empted if it interferes with the

> methods by which the federal statute was designed to reach th[at] goal" Id.; see also Michigan Canners and Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 477, 104 S. Ct. 2518, 2527, 81 L. Ed. 2d 399 (1984) (state statute establishing association to represent agricultural producers pre-empted even though it and the federal Agricultural Fair Practices Act "share the goal of augmenting the producer's bargaining power"); Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286-287, 106 S. Ct. 1057, 1060-1061, 89 L. Ed. 2d 223 (1986) (state statute preventing three-time violators of the National Labor Relations Act from doing business with the State is pre-empted even though state law was designed to reinforce requirements of federal Act.)

In fact, under the Supremacy Clause, "any state law, however clearly written a State's acknowledged power, - which interferes with or is contrary to federal law, must yield. Id. at 2388; Felder v. Casey, 487 U.S. at 138 (quoting Free v.

Bland, 369 U.S. 663, 666, (1962). "Even state regulation designed to protect vital state interests must give way to paramount federal legislation." De Canes v. Bica, 424 U.S. 351, 357 (1976).

B. The Decision Of The Supreme Court Of North Carolina Violates The Tests Enunciated By This Court.

In United States v. Snyder, 149 U.S. 210 (1893), the Court recognized the pervasive and comprehensive system of federal income taxation:

> It scarcely seems necessary to look beyond the Constitution itself for a decisive reply to the question we are now considering. The eighth section of the first article declares that "The congress shall have power to lay and collect taxes, duties, imposts, and excises...but all duties, imposts, and excises shall be uniform throughout the United States." The power to impose and collect the public burdens is here given in terms as absolute as the language affords. The

> provision exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government and both the grant of power and its limitation are wholly inconsistent with the proposition that the States can by legislation interfere with the assessment of Federal taxes, or set up a limitation of time within which they must be collected.

The power to tax and the importance of a uniform national scheme free from state control is so well entrenched in our constitutional history that the Court in Lyeth v. Hoey, 305 U.S. 188, 194 (1938) stated:

> In dealing with the meaning and application of an Act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted so as to give a

> uniform application to a nationwide scheme of taxation." Burnet v. Harmel, 287 U.S. 103, 110. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependant upon state law.

In the case at bar, the Supreme Court of North Carolina's decision conflicts with the decisions of this Court concerning field and conflict pre-emption. First, the decision was bottomed on express pre-emption. The Court relied on decisions of this Court dealing with express pre-emption, such as Cipollone v. Liggett Group, Inc., 505 U.S. ____, 112 S. Ct. 2608 (1992).

Second, the Supreme Court of North Carolina's decision is devoid of any discussion of Congressional intent. Third, the Court focuses on whether a Revenue Ruling of the Internal Revenue Service is

comprehensive instead of analyzing the pervasive and uniform scheme of regulation by the federal tax system, including the Internal Revenue Code, Regulations and Revenue Procedures. Fourth, the decision was completely silent on conflict pre-emption. The Supreme Court of North Carolina did not discuss whether the state statute stood as "an obstacle to the execution of the full purposes and objectives of Congress." Hines v. Davidowitz, supra. at 67.

The intent of Congress regarding a uniform scheme of federal taxation is clearly set out in the federal statutes. Congress has expressly authorized the Secretary of Treasury "to prescribe all needful rules and regulations for the enforcement of [Title 26], including all rules and regulations as may be necessary by reason of any alteration of law in

relation to internal revenue." 26 U.S.C. § 7805(a). In addition, under 26 USC § 7805(c), "the Secretary shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps and other matters pertaining to the assessment and collection of internal revenue." 26 USC § 6402(a) grants the Secretary the authority to make refunds. See also 26 CFR 601.105.

Additionally, 26 USC § 6694-6696 expresses a clear intent by Congress to regulate and control third party federal tax return preparers. Congress has provided for explicit detailed instructions which govern preparer actions. Under 26 USC § 6107, third party preparers must furnish a copy of the return to the taxpayer. A third party return preparer must furnish an identifying number. 26 USC § 6109. And a third party return preparer

must furnish information returns. 26 USC § 6060.

Pursuant to delegated authority, the Internal Revenue Service has established extensive penalties for third party return preparers. (26 CFR 1.6695.1), established an application procedure and criteria relating to who can participate in electronic filing, (Rev. Proc. 93-8), enumerated duties which a preparer must perform (Rev. Proc. 93-8, Secs. 8, 9, and 10), and designated specific duties and procedures which a return preparer must follow in assisting a taxpayer with a refund loan. (Rev. Proc. 93-8, Sec. 10). Moreover, Congress has established a broad, all-encompassing definition of a return preparer. 26 USC § 7701(a) 36A.

Revenue Procedure 93-8, which superseded Revenue Procedure 91-69 and Revenue Procedure 90-62, states that it is

based on a series of federal tax regulations, specifically 26 CFR 601.602; Part I, Sections 6012, 6061: 1.6012-5, 1.6061-1. Revenue Procedure 93-8 is entitled "Obligations of Participants in the Electronic Filing Program for 1040, U.S. Individual Income Tax Return." The regulation of Refund Anticipation Loans or (RALS) is found in Sections 10.02, 10.03, 10.04, 10.06, 10.07, 10.08 and 10.09. Under Section 13, the service may suspend any electronic filer who violates any of the rules of the Internal Revenue Service's Electronic Filing Program.

The express intent of Congress to regulate and govern tax preparers in the above-mentioned activities is clear. In the House report summary, the House specifically established the intent and purpose of the sections dealing with tax preparers. The House Report states:

> "The Bill contains many provisions designed to improve the administration of the tax laws and protect the rights of taxpayers. There are rules to regulate tax return preparers." H.R. Rep. No. 658, 94th Cong., 2d Sess. 6 (1976), reported in U.S.C.C.A.N. 2897, 2901.
>
> The Senate Report further notes:
>
> The committee amendment provides disclosure requirements and standards of conduct which are applicable to income tax return preparers. It gives the Secretary of the Treasury the power to impose penalties or to seek injunctions against preparers because of certain specified prohibited practices. The Amendment is substantially the same as the House bill. S. Rep. No. 938, 94th Cong., 2d Session 351 (1976), reprinted in 1976 U.S.C.C.A.N. 3439, 3780.

The Supreme Court of North Carolina's decision holding that the Refund Anticipation Loan Act is constitutional is clearly in conflict with Snyder, Lyeth, and

the decisions of this Court discussed above regarding field pre-emption. Congress did not make its comprehensive federal taxing authority dependant upon state law. Lyeth v. Hoey, supra. In fact, this Court has long held that attempts by states to regulate any area which the Internal Revenue Service has already regulated constitutes a violation of the Supremacy Clause. United States v. Snyder, supra.; United States v. Union Cent. Life Ins. Co., 368 U.S. 291 (1961).

With regard to conflict pre-emption, the decision of the Supreme Court of North Carolina is also in conflict with decisions of this Court. The Refund Anticipation Loan Act sets up several obstacles to the accomplishment and execution of Congress carrying out its uniform scheme of federal tax policy.

Under the Refund Anticipation Loan

Act, N.C.G.S. § 53-247, a person must register with the North Carolina Commissioner of Banks before he can process, receive, or accept for delivery an application for a refund anticipation loan or a check in payment of refund anticipation loan proceeds. If a person does not register with the Commissioner of Banks, he is guilty of a misdemeanor, punishable by imprisonment of up to 60 days, a fine of up to two thousand dollars, or both.

Under N.C.G.S. § 53-248, a person must fill out an application in a form prescribed by the Commissioner, and pay him two hundred and fifty dollars for each office where the registrant intends to facilitate refund anticipation loans. After the application is filed, the Commissioner decides whether the registrant will be approved. The Commissioner can

turn the registrant down if he finds that he doesn't command the confidence of his community. Each year, the facilitator must renew the registration and pay one hundred dollars for each office where he intends to facilitate loans during the succeeding year.

Pursuant to N.C.G.S. § 53-249, a facilitator must disclose his schedule of loan fees to the Commissioner on or before January 2 of each year. If the Commissioner is of the opinion that the facilitator's fee is unconscionable, he may require the facilitator to pay the debtor three times the amount of the fee and possibly revoke the facilitator's registration. The Act further requires the facilitator to publish a fee schedule in a prominent place in each office with a statement to the effect that the taxpayer may have the tax return filed

electronically without also obtaining a refund anticipation loan. The facilitator must meet several disclosure requirements and may not engage in any of the prohibited activities, pursuant to N.C.G.S. § 53-250.

The Commissioner of Banks can issue a cease and desist order against a facilitator, or revoke his registration. The facilitator is also subject to civil penalties. The Commissioner, under N.C.G.S. §53-253 may promulgate rules and make investigations, subpoena witnesses, require audits and reports, and conduct hearings regarding possible violations of the Act.

Under the Internal Revenue Service's Electronic Filing Program for Form 1040, an applicant must complete an application, undergo testing of its transmitting capability, pass a suitability check, receive a letter of acceptance and obtain a

filing or transmitter identification number. (Sec. 4, Rev. Proc. 93-8). An electronic filer is required to charge a flat fee to assist a taxpayer in applying for an RAL. The fee must be identical for all taxpayers and must not be related to the amount of the refund or RAL. (Sec. 10.04, Rev. Proc. 93-8). The Internal Revenue Service also has very detailed rules for monitoring and suspending an electronic filer. (Rev. Proc. 93-8, Sec. 13). Under Section 6 of Rev. Proc. 93-8, the Internal Revenue Service has penalties for violations of its rules.

The North Carolina Refund Anticipation Loan Act acts as an obstacle to the accomplishment and execution of the objectives of Congress concerning the uniform national scheme of federal income tax policy. Tax preparers should not have to go through additional state hurdles when

they have met the requirements of the Internal Revenue Service's Electronic Tax Filing Program. The fact that tax preparers can be approved for the program by the Internal Revenue Service and then be turned down by the North Carolina Commissioner of Banks would clearly frustrate the intent of Congress regarding the tax refund process, especially refund anticipation loans.

The regulation of refund anticipation loan fees and other obstacles set up by the North Carolina Refund Anticipation Loan Act clearly frustrate Congressional intent regarding tax refund loans. The Supreme Court of North Carolina's decision is in conflict with Rice v. Santa Fe Elevator Corp., supra. in that the matter on which the state asserts the right to act is regulated by the Internal Revenue Code, Regulations and Revenue Procedures. The

North Carolina Act also interferes with the methods by which Congress has set up for implementation of federal income tax policy, including tax refund loans.

II.

THE NORTH CAROLINA REFUND ANTICIPATION LOAN ACT IS UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT THE EFFECT OF THE ACT IS TO CONTROL NATIONAL BANKING TRANSACTIONS BEYOND THE STATE'S BORDERS AND TO UNDERMINE UNIFORMITY OF REGULATION.

A. The Effect Of The North Carolina Refund Anticipation Loan Act Is To Control National Banking Transactions Outside Of The State.

The North Carolina Supreme Court held below in the instant case that the North Carolina Refund Anticipation Loan Act is constitutional because it does not directly

regulate interstate commerce. In so holding, the North Carolina Supreme Court examined primarily North Carolina's legislative purpose in enacting the statute. Such an analysis is directly in conflict with decided precedents of this Court.

In Hughes v. Oklahoma, 441 U.S. 322 (1979), this Court enumerated that: "This Court is not bound by the name, description or characterization given it by the legislature or the courts of the State but will determine for itself the practical impact of the law." Id. at 262. Similar effects analysis is found in other recent decisions of this Court. See Healy v. Beer Institute, Inc., 491 U.S. 324 (1989); Wyoming v. Oklahoma, ____ U.S. ____, 112 S. Ct. 789 (1992). When a state statute in practical effect discriminates against interstate commerce, it will be struck down

as violative of the Commerce Clause. Wyoming, supra. at 800. In Shafer v. Farmers Grain Co., 268 U.S. 189 (1925), this Court recognized that "a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation, and invalid, regardless of the purpose with which it was enacted." Id. at 199.

The North Carolina Refund Anticipation Loan Act significantly impacts upon the interstate commerce of banking. The practical effect of the NCRALA is to control and regulate the conduct of National Banks beyond the borders of the state of North Carolina. None of the tax refund loans are made by banks inside of the borders of North Carolina. All of the tax refund loans which are made to North Carolina citizens are made by out-of-state National Banks. The state Act has a direct

impact on out-of-state lending transactions. No refund loan can be made by an out-of-state bank to a North Carolina citizen unless the North Carolina facilitator or taxpreparer has registered and been approved by the North Carolina Banking Commissioner. The significance of this negative effect on interstate commerce is that approximately ninety (90%) percent of those individuals in North Carolina who electronically file federal income tax returns also apply for refund loans.

Moreover, the North Carolina Supreme Court, although citing Edgar v. Mite Corp., 457 U.S. 124 (1982), failed to grasp the distinctions made in that case. In Edgar, this Court distinguished between intrastate securities transactions and interstate securities transactions. As this Court stressed in Edgar at p. 641:

> The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois.

Every lending transaction made by an out-of-state National Bank to a North Carolina citizen constitutes interstate commerce. The NCRALA is a substantial impediment to these interstate lending transactions. In Edgar, this Court similarly pointed out that securities transactions made outside of Illinois with Illinois citizens constitute interstate commerce: "These transactions would themselves be interstate commerce." Id. at 642. This Court emphasized in Edgar that the Illinois Act, unless complied with, sought to prevent MITE from making its offer and concluding interstate transactions not only with Chicago Rivet's stockholders living in Illinois, but also

with those living in other states and having no connection with Illinois. As this Court noted, the Illinois law on its face would apply even if not a single one of Chicago Rivet's shareholders were a resident of Illinois.

Likewise, in the instant case, a North Carolina company which participates in electronic filing of federal tax returns could have a clientele solely of customers in Virginia or South Carolina or Tennessee, and yet the North Carolina Banking Commissioner could preclude the refund loans because of his non-approval of the North Carolina tax preparer. As this Court noted in Edgar:

> The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State. In Southern Pacific Co. v. Arizona, 325 U.S. 761, 775, 89

> L. Ed. 1915, 65 S. Ct. 1515 (1945), the Court struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control [conduct] beyond the boundaries of the state..." Id. at 642-643.

The decision of the North Carolina Supreme Court conflicts with this Court's decision in Edgar v. Mite Corp., supra. The North Carolina Supreme Court failed to grasp the effects analysis in Edgar, and failed to recognize the importance of the banking transactions taking place outside of North Carolina's borders as it relates to the effect of the NCRALA on interstate commerce.

Furthermore, the decision in the instant case failed to address the practical effect that North Carolina regulation will likely have on a national basis. If North Carolina can impose such a state law to raise revenue and to allegedly

protect its consumers, then every other state could come up with its own regulations. In an era of budget shortfalls at the state level, this could be a convenient way of states raising substantial revenues quickly. However, if all of the other states were to adopt their own distinct laws, it would lead to the undermining of the comprehensive federal scheme of the Internal Revenue Service's Electronic Tax Filing Program. A national tax preparer might have to register and pay fees in every state, and be subject to the whims of each State's regulatory authority as to whether it was suitable to do business in that state. The result would be chaos. In Edgar this Court aptly noted at 642:

> Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions

> generated by tender offers would be thoroughly stifled.

In Healy, supra. at 336-337, this Court emphasized that:

> The practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

If each state were to enact its own regulatory scheme in this area, it would create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude. Healy at 337. The ramifications of such local economic regulation in this area by

all of the other states would be catastrophic. Realizing that electronic filing of federal tax returns and refund loans will be the norm by the end of this decade, certiorari should be granted by this Court to resolve this federal Constitutional question before the federal electronic tax filing program is undermined by competing state regulation.

In this era of national and regional banking, the power of national banks to make loans to citizens in other states is essential for the continued growth and economic viability of these banks. The power to make loans is a core life-sustaining function of all banks. The regulatory power given the North Carolina Banking Commissioner under the NCRALA directly impinges upon the ability of the national banks to sustain themselves by engaging in regional and national lending

across state boundaries.

B. The North Carolina Refund Anticipation Loan Act Undermines The Uniformity Of Federal Tax System.

In addition to the effect of the NCRALA on controlling national banking transactions beyond the state's borders, the Act also undermines the uniformity of national regulation. The North Carolina Supreme Court's decision is significantly flawed because it failed to even address the issue of uniformity of national regulation as it relates to the federal tax system. Article I, Section 8, Clause 1 of the United States Constitution provides for uniformity in the federal tax system. In Welton v. Missouri, 91 U.S. 275 (1876) at 280, this Court concluded:

> Where the subject to which the power applies is national in its character, or of such a nature as to admit of

> uniformity of regulation, the power is exclusive of all State authority.

This Court struck down a Missouri statute providing for a license tax on salespersons who sold goods manufactured outside the state and sold in Missouri. Emphasizing the need for uniformity of commercial regulation, this Court emphasized in Welton that such a state license tax would undermine the authority of the United States. In Welton, this Court explained how such state regulation could undermine the uniformity of commercial regulation. "Imports operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might

follow."

In Cooley v. Board of Wardens, 53 U.S. 299 (1851), this Court recognized that there are some areas of commerce which are left to the exclusive regulatory power and authority of Congress, and that these areas imperatively demand a single uniform rule. This has often been referred to as the exclusivity doctrine. Historically, the federal tax system and interstate travel, have been areas of exclusive federal regulation. See United States v. Snyder, supra. and Lyeth v. Hoey, supra.

This Court in Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) held that the Arizona Train Liti Law, making it unlawful to operate within the State a passenger train of more than fourteen cars or a freight train of more than seventy cars, was violative of the Commerce Clause of the United States Constitution as applied to

interstate trains. This Court further pointed out that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the Commerce Clause from state interference. In Southern Pacific Co., supra., the Court concluded at 767:

> But ever since Gibbons v. Ogden, 9 Wheat. (US) 1, 6 L. ed 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.

Pursuant to the plenary powers conferred upon Congress by the United States Constitution, the delegation by Congress to the Secretary of the Treasury, and its delegation of broad powers to the Internal Revenue Service, the Internal

Revenue Service has the power and authority to regulate all aspects of the federal tax system, including refunds. The service regulates who may participate and how individuals may participate in its national system of collection, dispersement, and refund of revenue. Specific revenue regulations and procedure detail these matters with respect to taxpayers, tax return preparers, and banks. 26 USCS § 6402, Revenue Procedure 91-69, Revenue Procedure 90-62, Revenue Procedure 93-8.

Electronic filing of federal tax returns constitutes electronic transmission of data across state lines, and the tax refund loans constitute lending transactions from national out-of-state banks to citizens within North Carolina. The tax preparer or facilitator is a conduit between the Internal Revenue Service and the Bank. Before a tax refund

loan is made, the IRS either accepts or rejects the return for electronic filing. If accepted, the IRS arranges for the direct deposit of the refund to a prearranged bank account at the National Bank. The Bank is subsequently reimbursed by the IRS. The entire process of electronic filing of federal tax returns and the tax refund loans inextricably involve interstate commerce. See Swartz v. H & R Block, Inc., 119 B.R. 219 (U.S. Bankruptcy Court, D. Idaho, 1990).

The out-of-state national banks would not be able to make tax refund loans without the assistance of the tax preparers. This is because these national banks do not have the means to determine on their own which federal taxpayers use electronic filing and are entitled to a refund. Under the strict disclosure rules, the out-of-state national banks would be

precluded from obtaining this information on their own. 26 USCS § 7213. Through a system of cooperation with tax preparers throughout the United States, tax return preparers are able to "facilitate" loan transactions based on the refunds due federal taxpayers. 26 USCS § 6713.

Congress has recognized the increasing importance of the tax return preparer in the federal filing system:

> The past few years have seen a substantial increase in the number of persons whose business is to prepare income tax returns for individuals and families of average income. The Internal Revenue Service estimates that for the year 1972, 35 million taxpayers, or one-half of all those who filed income tax returns, sought some form of professional or commercial tax advice in preparing returns. H.R. Rep. No. 658, 94th Cong., 2d Sess. 274 (1976), reprinted in 1976 USCCAN 2897, 3169.

It is only through a system of tax preparer cooperation that such tax refund

loans are possible. In such a system of restricted disclosure, it is not feasible economically for national out-of-state banks to contact all of the citizens of North Carolina to determine which ones plan to participate in the electronic filing of federal tax returns and tax refund loans in a given year. The NCRALA, by regulating tax preparers involved in the federal electronic filing program, burdens out-of-state national banks in their tax refund lending function vis.a.vis North Carolina taxpayers. As such, the North Carolina Refund Anticipation Loan Act is unconstitutional pursuant to the Commerce Clause of the United States Constitution in that the effect of the Act is to control national banking transactions beyond the borders of North Carolina and to undermine the uniformity of federal regulation.

Given the conflict between the

decision of the Supreme Court of North Carolina with the decisions of this Court concerning the Commerce Clause and the Supremacy Clause of the United States Constitution, and the importance of these constitutional questions on the federal tax and national banking systems, certiorari should be granted.

CONCLUSION

For the foregoing reasons, certiorari should be granted and the decision of the court below reversed.

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IN THE SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA ASSOCIATION OF ELECTRONIC TAX FILERS, INC., and ROCKET REFUND, INC.	)	FILED May 7, 1993
v.	)	No. 228PA92-Wake
WILLIAM T. GRAHAM, Commissioner of Banks, North Carolina Banking Commission	)	

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of summary judgment for defendant entered by Stephens, J., at the 12 February 1992 Civil Session of Superior Court, Wake County. Heard in the Supreme Court 13 January 1993.

Kennedy, Kennedy, Kennedy & Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellants.

Michael F. Easley, Attorney General, by Philip A. Lehman, Assistant Attorney General; and L. McNeil Chestnut and Mercedes Oglukian for defendant-appellee.

North Carolina Legal Services Resource Center, Inc., by Gregory C. Malhoit, and North State Legal Services, Inc., by Carlene McNulty, for North Carolina Clients Council, amicus curiae.

PARKER, Justice.

Plaintiffs filed this action for a declaratory judgment asserting that the Refund Anticipation Loan Act, N.C.G.S. §§ 53-245 to 53-254 (effective Oct. 1, 1990), violates both the Supremacy Clause and the Commerce Clause of the United States Constitution and asking that the Act be declared unconstitutional on its face and in its application to refund anticipation loans made by out-of-state national banks. Plaintiffs moved for summary judgment; the trial court denied plaintiffs' motion and entered summary judgment in favor of defendant. The court concluded (i) there are no genuine issues of material fact and (ii) the Refund Anticipation Loan Act

violates neither the Supremacy Clause nor the Commerce Clause of the United States Constitution. On 16 July 1992 this Court granted plaintiffs' petition for discretionary review. Before this Court plaintiffs again contend the Act violates the Supremacy Clause and the Commerce Clause. We disagree and affirm summary judgment for defendant.

Plaintiffs are North Carolina corporations, each with its principal place of business in Southern Pines, North Carolina. Plaintiff Association is composed of North Carolina businesses participating in the Internal Revenue Service Electronic Filing Program for Form 1040, which permits taxpayers to file income tax returns electronically. Plaintiff Rocket Refund is a member of the Association. Members of plaintiff Association also accept and facilitate

refund anticipation loan ("RAL") applications utilizing the loan services of out-of-state national banks. To determine the validity of plaintiffs' arguments that the Refund Anticipation Loan Act violates the Supremacy and Commerce Clauses of the United States Constitution, we need at the outset to examine pertinent revenue procedures and the provisions of the Act itself.

To be accepted into the Electronic Filing Program for Form 1040, an applicant must complete an application, undergo testing of its transmitting capability, pass a suitability check, receive a letter of acceptance and obtain a filing or transmitter identification number. Rev. Proc. 91-69, 1991-2 C.B. 893, 894 (effective Jan. 1, 1992); see also Rev. Proc. 90-62, 1990-2 C.B. 659, 660 (effective Jan. 1, 1991.). Once accepted,

a participant becomes an electronic filer and is categorized as an electronic return originator, a software developer, a transmitter, or some combination thereof. Rev. Proc. 91-69, 1991-2 C.B. at 894. Revenue procedures inform electronic filers "of their obligations to the Internal Revenue Service, taxpayers, and other participants." Id. at 893. Responsibilities of electronic filers include ensuring that complete returns are accurately and efficiently filed and complying with all publications and notices of the Electronic Filing Systems Office. Id. at 895. If an electronic filer charges a fee for transmission of a tax return, the fee may not be based on a percentage of the refund amount. Id. Penalties are provided for disclosure or use of tax return information. Id. at 896. In addition, electronic filers who also meet the

definition of income tax preparers may be subjected to preparer penalties. Id. The Internal Revenue Service ("the Service") monitors electronic filers for conformity with revenue procedures; this monitoring includes checking on (i) timely receipt and legibility of forms and (ii) quality of transmission, including rejections, errors and other defects. Id. at 899. The Service also monitors complaints about filers. The Service may issue a warning letter describing specific corrective action for deviations from Revenue Procedure 91-69 or may immediately suspend a filer from the program. Id.

According to Section 9 of Revenue Procedure 91-69, "Direct Deposit of Refunds," taxpayer expecting to receive a refund may file a return electronically and elect to have the refund deposited directly into a bank account. Id. at 897; see also

Rev. Proc. 90-62, 1990-2 C.B. at 662. Section 10 of Revenue Procedure 91-69 recognizes that often taxpayers borrow against expected refunds:

> .01 A Refund Anticipation Loan (RAL) is money borrowed by a taxpayer that is based on a taxpayer's anticipated income tax refund. The Service has no involvement in RALs. This is a contract between the taxpayer and the lender. An acknowledgment from the Service processing is not a guarantee to either the taxpayer or lender that the taxpayer will receive a refund or what the amount of any refund might be.

Rev. Proc. 91-69, 1991-2 C.B. at 897. By contrast, the predecessor procedure, Revenue Procedure 90-62, provided simply, "The Service has no involvement in RALs. This is a contract between the taxpayer and the financial institution." Rev. Proc. 90-62, 1990-2 C.B. at 663. Section 10 of Revenue Procedure 91-69 also provides as

follows:

> .02 Any entity that is involved in the Electronic Filing Program, including a financial institution that accepts direct deposits of income tax refunds, has an obligation to every taxpayer who applies for an RAL to ensure that the taxpayer understands that an RAL is in fact a loan, and not a substitute for or a quicker way of receiving an income tax refund. Consequently, if a direct deposit is not made as originally anticipated by the taxpayer, the taxpayer may be liable for additional interest or fees.

Rev. Proc. 91-69, 1991-2 C.B. at 898. Other language in Section 10 regulating electronic filers facilitating RALs includes (i) a provision requiring written consent of the taxpayer before the filer may disclose tax information to a lender and (ii) a prohibition against guaranteeing the amount of the refund or the date it will be issued. Id. at 898.

The Refund Anticipation Loan Act defines an RAL as "[a] loan that the creditor arranges to be repaid directly from the proceeds of the debtor's income tax refund." N.C.G.S. § 53-246(8) (Supp. 1992). Creditors are those who make RALs, id. § 53-246(4); and facilitators are those who process, receive, or accept for delivery an application for an RAL or a check in payment of RAL proceeds or otherwise facilitate the making of RALs, id. § 53-246(6). RAL fees are "charges, fees, or other consideration charged or imposed by" creditors or facilitators. Id. § 53-246(9). RAL fees are distinct from charges for nonloan services such as preparation or electronic filing of returns. Id.

The Act requires persons handling RAL applications to register with the North Carolina Commissioner of Banks. Id. § 53-

247(a). Banks, savings associations or credit unions doing business under North Carolina or United States law are specifically exempted. Id. § 53-247(c). Failure to register constitutes a misdemeanor punishable by imprisonment of up to sixty days, a fine of up to $2,000, or both. Id. § 53-247(b). Registration procedures include submitting an application and fee of $250.00 for each office wherein RALs will be facilitated. Id. § 53-248(a). In addition the Commissioner must find "that the responsibility and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business of facilitating [RALs] will be operated" in accord with the Act. Id. If not renewed, registration expires on 31 December following the date issued; and the renewal fee is $100.00.

Id. § 53-248(b).

Registrants are subject to additional regulation, in that they must file fee schedules, id. 53-249(a); post them prominently, id. 53-249(c); and make full disclosure to debtors, id. § 53-249(d). More specifically, registrants must disclose

> [e]xamples of the annual percentage rates, as defined by the Truth In Lending Act, 15 U.S.C. § 1607 and 12 C.F.R. Section 226.22, for refund anticipation loans of five hundred dollars ($500.00), seven hundred fifty dollars ($750.00), one thousand dollars ($1,000), one thousand five hundred dollars ($1,500), two thousand dollars ($2,000), and three thousand dollars ($3,000). Regardless of disclosures of the annual percentage rate required by the Truth In Lending Act, if the debtor is required to establish or maintain a deposit account with the creditor for receipt of the debtor's tax refund to offset the amount owed on the loan, the maturity of the loan for the purpose of determining the

> annual percentage rate disclosure under this section shall be assumed to be the estimated date when the tax refund will be deposited in the debtor's account.

Id. § 53-249(d)(6).

In addition, acts specifically prohibited include (i) misrepresentation of a material factor or condition of an RAL; (ii) failing to arrange for an RAL promptly upon application; (iii) engaging in fraud; (iv) facilitating an RAL for which the fee is different from that posted or filed with the Commissioner or has been determined to be unconscionable; (v) demanding part of the loan proceeds for check cashing, credit insurance, or other goods or services unrelated to preparing and filing returns or facilitating RALs; and (vi) arranging for a secured interest in property other than the debtor's refund proceeds. Id. § 53-250. Upon finding that any conduct of a

registrant may be in violatin of the Act or that a registrant has engaged in an unfair or deceptive act or practice, the Commissioner must give notice and an opportunity for the registrant to be heard. Id. § 53-251. Upon finding conduct to be in violation of the Act, the Commissioner shall issue a cease and desist order. Id. Appeals may be taken to the North Carolina Court of Appeals. Id. § 53-252. If a registrant fails to appeal and continues to engage in prohibited conduct cited in a cease and desist order, there is a mandatory $1,000 penalty for each such act. Id. § 53-251(a). Registration may be revoked for a course of conduct in violation of the Act or continually engaging in conduct cited in a cease and desist order. Id. § 53-251(b). Civil penalties include (i) for failure to deliver proceeds of an RAL within forty-

eight hours of the time promised, refund of the RAL fee and (ii) for engaging in prohibited acts, treble RAL fees (or other unauthorized charges) plus a reasonable attorney's fee. Id. § 53-251(c).

Plaintiffs' first contention is that the Refund Anticipation Loan Act violates the Supremacy Clause. We disagree.

As stated by the United States Supreme Court, under the Supremacy Clause

> the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land." US const, Art VI, cl 2. In determining whether Congress has invoked this pre-emption power, we give primary emphasis to the ascertainment of congressional intent. This may be manifested in several ways. Chief among the indications of an intent to pre-empt is where Congress has legislated so comprehensively that it has left no room for supplementary state legislation. Pre-emption may also be found where state legislation would impede the

> purposes and objectives of Congress. In undertaking this analysis, however, we must be mindful of the principle that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

R. J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140, 93 L. Ed. 2d 449, 461-62 (1986) (citations omitted); see also Cippollone v. Liggett Group, Inc., ____ U.S. ____, ____, 120 L. Ed. 2d 407, 420 (1992) (reiterating that intent to preempt may be explicitly stated in statute and finding explicit statements in Federal Cigarette Labeling and Advertising Act of 1965 and Public Health Cigarette Smoking Act of 1969).

In Reynolds Tobacco, the issue was whether Congress had exercised its power

under the Supremacy Clause to preempt state ad valorem taxation of imported goods stored in customs-bonded warehouses and destined for domestic markets. The federal statute at issue was 19 U.S.C. § 1556, and in deciding the preemption question in favor of the state, the Court said:

> Nor is there any suggestion that [ad valorem] taxation here would conflict with the central purpose behind the customs-bonded warehouses: to ensure that federal customs duties are collected. Not only is the present statutory and regulatory framework sufficient to permit customs officials to monitor the entrance and removal of goods [and] to guarantee collection of federal revenue, but Reynolds does not explain how...imposition of the North Carolina tax will prevent customs officials from receiving the duties. And the present statutes and regulations that guide this monitoring...are not so comprehensive as to leave no room for North Carolina's assessment of ad valorem taxes. Although the

> regulations are not themselves controlling on the pre-emption issue, where, as in this case, Congress has entrusted an agency with the task of promulgating regulations to carry out the purposes of a statute [19 USCS § 1556], as part of the pre-emption analysis we must consider whether the regulations evidence a desire to occupy a field completely. Pre-emption should not be inferred, however, simply because the agency's regulations are comprehensive. In this case, the current regulations, while detailed, appear to contemplate some concurrent state regulation and, arguably, even state taxation.

Id. at 148-49, 93 L. Ed. 2d at 467 (citations omitted). The Court held that North Carolina could, consistent with the Supremacy Clause, impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale. Id. at 152, 93 L. Ed. 2d at 469.

Following Reynolds Tobacco, we begin with the principle that federal regulation is not deemed preemptive in the absence of persuasive reasons. We turn first to plaintiffs' argument that Congress has legislated so comprehensively that it has left no room for supplementary state legislation on RALs. The only federal taxation statute cited by plaintiffs provides as follows:

> **Regulations requiring returns on magnetic media, etc.**
> **(1) In general**
> The Secretary shall prescribe regulations providing standards for determining which returns must be filed on magnetic media or in other machine-readable form. The Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be other than on paper forms supplied by the Secretary.
> **(2) Requirements of regulations**
> In prescribing regulations under paragraph (1), the Secretary--

> (A) shall not require any person to file returns on magnetic media unless such person is required to file at least 250 returns during the calendar year, and
> (B) shall take into account (among other relevant factors) the ability of the taxpayer to comply at reasonable cost with the requirements of such regulations.

26 U.S.C. § 6011(e) (Supp. II 1990). By its plain language this statute pertains only to electronic filing. One regulation cited by plaintiffs provides as follows:

> **Composite return in lieu of specified form.**
>
> The Commissioner may authorize the use, at the option of a person required to make a return, of a composite return in lieu of any form specified in this part for use by such a person, subject to such conditions, limitations, and special rules governing the preparation, execution, filing, and correction thereof as the Commissioner may deem appropriate. Such composite return shall consist of a form prescribed by the Commissioner and an attachment or

> attachments of magnetic tape or other approved media. Notwithstanding any provisions in this part to the contrary, a single form and attachment may comprise the returns of more than one such person. To the extent that the use of a composite return has been authorized by the Commissioner, references in this part to a specific form for use by such a person shall be deemed to refer also to a composite return under this section.

26 C.F.R. § 1.6012-5 (1992). By its plain language this regulation pertains to composite returns. Another regulation cited by plaintiffs, 26 C.F.R. § 301.7701-15(c) (1992), mentions neither electronic filing nor RALs.

The only authority cited by plaintiffs that specifically mentions RALs is Revenue Procedure 90-62, which as noted and discussed above has been superseded by Revenue Procedure 91-69. Defendant argues that revenue procedures, being informal

service publications, are without legal effect in Supremacy Clause challenges. Caterpillar Tractor Co. v. United States, 589 F. 2d 1040, 1043 (Ct. Cl. 1978) (stating, "[I]nformal publications all the way up to revenue rulings are simply guides to taxpayers."); see also 26 C.F.R. § 601.601(d)(2)(i)(b) (1992) (defining "Revenue Procedure" as a statement that affects rights or duties of taxpayers under the Code and related statutes); Michael D. Rose and John C. Chommie, Federal Income Taxation 9-10 (3d ed. 1988) (stating that less important Service interpretations include revenue rulings; other interpretations include revenue procedures).

Even if revenue procedures had the force and effect of a federal statute or regulation, however, we are unable to conclude that either Revenue Procedure 90-

62 or its successor, Revenue Procedure 91-69, shows an intent to preempt by comprehensively legislating RALs. The detailed procedures govern electronic filing of tax returns, not RALs. In fact, both revenue procedures specifically disclaim such intention, stating, "The service has no involvement in RALs." Rev. Proc. 91-69, 1991-2 C.B. at 897; Rev. Proc. 90-62, 1990-2 C.B. at 663. The additional language in Revenue Procedure 91-69 requiring filers to ensure that taxpayers understand RALs are loans and not a substitute for or a quicker way of receiving income tax refunds is not, in our view, indicative of preemptive intent. The Service itself did not consider the 1991 additions to Revenue Procedure 90-62 to be significant changes. Rev. Proc. 91-69, 1991-2 C.B. at 894. Comparing the two revenue procedures with the comprehensive

legislative schemes at issue in Reynolds Tobacco and Cipollone, we conclude plaintiffs have failed to show preemptive intent in federal statutes or in regulations or publications of the Service.

Plaintiffs also contend the Refund Anticipation Loan Act violates the Supremacy Clause because it infringes upon and interferes with business operations of out-of-state banks. Again we disagree.

Banks are specifically exempted from the operation of the Act. N.C.G.S. § 53-247(c). The requirements of the Act are applicable only to in-state, nonbank facilitators of RALs. Even if banks were not exempt, however, plaintiffs have cited neither a specific provision of the National Banking Act nor any interpretive regulation indicative of preemptive intent with respect to RALs, and our research discloses none. Moreover, the record

discloses no evidence that any business activities of any national banks are impeded by the Act or that the Act interferes with any federal regulatory authority over national banks.

"[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law," summary judgment "shall be rendered forthwith." N.C.G.S. § 1A-1, Rule 56 (1990); Collingwood v. G.E. Real Estate Equities, 324 N.C. 63, 66, 376 S.E. 2d 425, 427 (1989). Plaintiffs having failed to show any comprehensive legislative scheme indicative of Congress' intent to preempt state legislation on RALs, we conclude the Refund Anticipation Loan Act does not violate the Supremacy Clause; therefore, we

hold the trial court did not err in granting summary judgment for defendants on this issue.

Plaintiffs' second and final contention is that the Act violates the Commerce Clause. Again we disagree.

"Although the commerce clause conferred on the national government power to regulate commerce...in the absence of conflicting legislation by Congress, there is a residuum of power in the state[s] to make laws governing matters of local concern which nevertheless...affect interstate commerce or even...regulate it." Southern Pacific Co. v. Arizona, 325 U.S. 761, 766-67, 89 L. Ed. 1915, 1923 (1945); see also Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669-70, 67 L. Ed. 2d 580, 586 (1981) (reaffirming same principle). "Not every exercise of state power with some impact on interstate

commerce is invalid." Edgar v. Mite Corp., 457 U.S. 624, 640, 73 L. Ed. 2d 269, 282 (1982). A two-tiered approach to analyzing state economic regulation under the Commerce Clause has been adopted by the United States Supreme Court:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause and the category subject to the...balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Brown-Forman Distillers v. N.Y. Liquor Auth., 476 U.S. 573, 578-79, 90 L. Ed. 2d 552, 559-60 (1986) (citations omitted). In Brown-Forman Distillers, appellant contended that a state statute directly regulated interstate commerce because it effectively regulated the price at which liquor was sold in other states and disadvantaged consumers in other states. Id. at 579-80, 90 L. Ed 2d at 560. Defendant argues, and we agree, that the Refund Anticipation Loan Act does not directly regulate interstate commerce and that it does not favor in-state economic interests over out-of-state interests. In this respect we find plaintiffs' case to be distinguishable from Brown-Forman.

Turning, then, to the second tier of the Brown-Forman analysis, we note first that since all RAL facilitators are required to register, the Act regulates

evenhandedly. In addition, the legitimacy of the Act's purpose is unassailable. The Act's primary purpose is consumer protection: It ensures disclosure of two kinds of information important to potential debtors. First, facilitators must disclose that RAL transactions are not the same as tax refunds or the electronic filing of tax returns. In addition the actual cost of an RAL must be disclosed.

The actual cost of an RAL, expressed as an annual percentage rate, may be quite high. The affidavit of W. Reitzel Deaton, Consumer Finance Administrator for the North Carolina Banking Commission, states that the typical transaction includes three separate fees, all deducted from the debtor's loan proceeds: (i) a preparation fee (if the registrant is also the preparer); (ii) a fee for electronic filing; and (iii) a fee charged by the

creditor who makes the loan. The Commissioner's authority as to fees is limited to determining if loan fees are unconscionable. N.C.G.S. § 53-249(b). The average loan fee charged in 1991 was $33.00. The Commissioner has determined that a loan fee of $60.00 would be unconscionable. The effective annual percentage rate for a $500.00 RAL with a $60.00 loan fee would be 243.33%, based on an 18-day period for repayment by refund, the period used by the largest RAL facilitator in North Carolina. According to defendant, the effective annual percentage rate for a $500.00 RAL with a $30.00 loan fee would be over 100% for the same 18-day period. We agree with defendant that North Carolina has an interest in ensuring that this state's residents are fully informed as to (i) the difference between an RAL and simple

electronic filing of refunds and (ii) the potentially high cost of an RAL.

The United States Supreme Court has recognized that state statutes enacted for a legitimate local purpose may still violate the Commerce Clause if they further the purpose only marginally or place an undue burden on interstate commerce. Kassel v. Consolidated Freightways Corp., 450 U.S. at 670, 67 L. Ed. 2d at 587. The burden imposed on interstate commerce by the Refund Anticipation Loan Act, however, is minimal. We also note that other courts have protected state registration statutes from challenges based on the Commerce Clause. Sear, Roebuck and Co. v. Brown, 806 F. 2d 399 (2d Cir. 1986) (applying balancing test and holding banking statute, which regulated manner and extent to which bank or savings and loan holding companies could establish offices in state, did not

violate Commerce Clause); Oil Resources v. State of Fla., Dept. of Banking, 583 F. Supp. 1027 (S.D. Fla.) (applying balancing test and holding statute, which required securities dealers to register with state banking department, did not violate Commerce Clause), aff'd, 746 F. 2d 814 (11th Cir. 1984).

Furthermore, the Act is not different in scope from other North Carolina statutes which require registration or licensing of businesses for consumer protection purposes. These include statutes governing finance companies, N.C.G.S. §§ 53-165 to 53-191 (1990 and Supp. 1992); collection agencies, N.C.G.S. §§ 58-70-1 to 58-70-125 (1991); loan brokers, N.C.G.S. §§ 66-106 to 66-112 (1991); business opportunity sellers, N.C.G.S. §§ 66-94 to 66-100 (1992); mortgage brokers, N.C.G.S. §§ 53-233 to 53-244 (1990 and Supp. 1992); and

automobile dealers and manufacturers , N.C.G.S. §§ 20-285 to 20-308.2 (1989 and Supp. 1992). All these businesses may be engaged in interstate commerce. Nevertheless, the constitutionality of such state regulatory statutes is accepted because they serve the legitimate purpose of consumer protection and impose only a minimal burden on interstate commerce.

Having determined that the Act's burden on interstate commerce is only incidental; that the burden does not exceed the local benefits; and that no pervasive federal regulatory scheme exists for RALs, we conclude the Refund Anticipation Loan Act does not place an undue burden on interstate commerce. Accordingly, we hold that under Collingwood, the trial court did not err in granting summary judgment for defendant on this issue.

AFFIRMED.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
WAKE COUNTY	92 CVS 00032

NORTH CAROLINA ASSOCIATION OF ELECTRONIC TAX FILERS, INC. and ROCKET REFUND, INC.,	)	
Plaintiffs,	)	
vs.	)	JUDGMENT
WILLIAM T. GRAHAM, Commissioner of Banks, North Carolina Banking Commission,	)	
Defendant.	)	

THIS CAUSE came on to be heard before the undersigned Superior Court Judge this 12th day of February, 1992, on the plaintiffs' motion for summary judgment. From the record herein the briefs and arguments of counsel, the Court makes the following conclusions of law:

1. There are no genuine issues of material fact and the matter is appropriate

for resolution by summary judgment.

2. The plaintiffs' motion for summary judgment is based on their claim that the Refund Anticipation Loan Act, G.S. § 53-245 et seq. is unconstitutional on its face because it allegedly violates the supremacy and commerce clauses of the U.S. Constitution. There are no other issues for resolution in this case other than these constitutional claims.

3. The Refund Anticipation Loan Act does not violate the supremacy or commerce clauses of the U.S.Constitution. Said act is a valid enactment of the North Carolina General Assembly and is constitutional on its face.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiffs' motion for summary judgment is denied; that summary judgment is entered in favor of the defendant; and that the plaintiffs' action

is dismissed with prejudice.

This the 14th day of August, 1992.

s/ Donald W. Stephens
Superior Court Judge

Refund Anticipation Loan Act

§ 53-245. Title and scope.

(a) Title. This Article shall be known and cited as the "Refund Anticipation Loan Act".

(b) Scope. No person may individually or in conjunction or cooperation with another person process, receive, or accept for delivery an application for a refund anticipation loan or a check in payment of refund anticipation loan proceeds or in any other manner facilitate the making of a refund anticipation loan unless the person has complied with the provisions of this Article. In addition, G.S. 143-3.3 prohibits refund anticipation loans repaid from refunds of North Carolina tax.

§ 53-246. Definitions.

The following definitions apply in this Article:

(1) Applicant. A person who applies for registration as a facilitator of refund anticipation loans.

(2) Commission. The State Banking Commission.

(3) Commissioner. The Commissioner of Banks.

(4) Creditor. A person who makes a refund anticipation loan.

(5) Debtor. A person who receives the proceeds of a refund anticipation loan.

(6) Facilitator. A person who individually or in conjunction or cooperation with another person processes, receives, or accepts for delivery an application for a

refund anticipation loan or a check in payment of refund anticipation loan proceeds or in any other manner facilitates the making of a refund anticipation loan.

(7) Person. An individual, a firm, a partnership, an association, a corporation, or another entity.

(8) Refund anticipation loan. A loan that the creditor arranges to be repaid directly from the proceeds of the debtor's income tax refund.

(9) Refund anticipation loan fee. The charges, fees, or other consideration charged or imposed by the creditor or facilitator for the making of a refund anticipation loan. This term does not include any charge, fee, or other consideration usually charged or imposed by the facilitator in the ordinary course of business for nonloan services, such as fees for tax return preparation and fees for electronic filing of tax returns.

(10) Registrant. A person who is registered as a facilitator of refund anticipation loans under this Article.

§ 53-247. Registration requirement.

(a) Registration Requirement. No person may individually or in conjunction or cooperation with another person process, receive, or accept for delivery an application for a refund anticipation loan or a check in payment of refund

anticipation loan proceeds without first being registered with the Commissioner in accordance with the registration procedure provided in this Article.

(b) Criminal Penalty. Violation of this section is a misdemeanor, punishable by imprisonment up to 60 days, a fine of up to two thousand dollars ($2,000), or both.

(c) Exemption. This section does not apply to a person doing business as a bank, savings association, or credit union, under the laws of this State or the United States.

§ 53-248. Registration procedure.

(a) Initial Registration. An application to become registered as a facilitator shall be in writing, under oath, and in a form prescribed by the Commissioner. The application shall contain all information prescribed by the Commissioner. Each application for registration shall be accompanied by a fee, payable to the Commissioner, of two hundred fifty dollars ($250.00) for each office where the registrant intends to facilitate refund anticipation loans.

Upon the filing of an application for registration, if the Commissioner finds that the responsibility and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business of facilitating refund anticipation loans will be operated within the purposes of this Article, the Commissioner shall register the applicant as a facilitator of refund anticipation loans and shall issue and transmit to the applicant a certificate attesting to the registration. If the Commissioner does not

so find, he shall not register the applicant and shall notify the applicant of the reasons for the denial.

Upon receipt of a certificate of registration, the applicant is registered under this Article and may engage in the business of facilitating refund anticipation loans at the offices identified on the application for registration.

(b) Renewal. Each registration as a facilitator of refund anticipation loans shall expire on December 31 following the date it was issued, unless it is renewed for the succeeding year. Before the registration expires, the registrant may renew the registration by filing with the Commissioner an application for renewal in the form and containing all information prescribed by the Commissioner. Each application for renewal of registration shall be accompanied by a fee of one hundred dollars ($100.00) for each office where the registrant intends to facilitate refund anticipation loans during the succeeding year.

Upon the filing of an application for renewal of registration under this Article, the Commissioner shall renew the registration unless the Commissioner determines that the fitness of the registrant or the operations of the registrant would not support registration of the registrant under subsection (a). If the Commissioner makes such a determination, he shall so notify the registrant, stating the reasons for the determination.

(c) Display of Certificate. Each registrant shall prominently display a certificate issued under this Article in

each place of business in the State where the registrant facilitates the making of refund anticipation loans.

§ 53-249. Filing and posting of loan fees; disclosures.

(a) Filing of Fee Schedule. On or before January 2 of each year, each registrant shall file with the Commissioner a schedule of the refund anticipation loan fees for refund anticipation loans to be facilitated by the registrant during the succeeding year. Immediately upon learning of any change in the refund anticipation loan fee for that year, the registrant shall file an amendment with the Commissioner setting out the change. Filing is effective upon receipt of the Commissioner.

(b) Notice of Unconscionable Fee. If the Commissioner finds that a refund anticipation loan fee filed pursuant to subsection (a) is unconscionable, he shall notify the registrant that (i) in his opinion the fee is unconscionable and (ii) the consequences of charging a refund anticipation loan fee in an amount that the Commissioner has notified the registrant is unconscionable include liability to the debtor for three times the amount of that fee and possible revocation of registration as a facilitator after notice and a hearing.

(c) Posting of Fee Schedule. Every registrant shall prominently display at each office where the registrant is facilitating refund anticipation loans a schedule showing the current refund anticipation loan fees for refund anticipation loans facilitated at the

office and the current electronic filing fees for the electronic filing of the taxpayer's tax return. Every registrant shall also prominently display on each fee schedule a statement to the effect that the taxpayer may have the tax return filed electronically without also obtaining a refund anticipation loan unless (i) the schedule required by this subsection is displayed and (ii) the refund anticipation loan fee actually charged is the same as the fee displayed on the schedule and the fee filed with the Commissioner pursuant to subsection (a).

(d) Disclosures. At the time a debtor applies for a refund anticipation loan, the registrant shall disclose to the debtor on a form separate from the application:

(1) The fee for the loan.

(2) The fee for electronic filing of a tax return.

(3) The time within which the proceeds of the loan will be paid to the debtor if the loan is approved.

(4) That the debtor is responsible for repayment of the loan and related fees in the event the tax refund is not paid or is not paid in full.

(5) The availability of electronic filing of the taxpayer's tax return, along with the average time announced by the appropriate taxing authority within which a taxpayer can expect to receive a refund if the taxpayer's return is filed electronically and the taxpayer does not obtain a refund anticipation loan.

(6) Examples of the annual percentage

rates, as defined by the Truth In Lending Act, 15 U.S.C. § 1607 and 12 C.F.R. Section 226.22, for refund anticipation loans of five hundred dollars ($500.00), seven hundred fifty dollars ($750.00), one thousand dollars ($1,000), one thousand five hundred dollars ($1,500), two thousand dollars ($2,000), and three thousand dollars ($3,000). Regardless of disclosures of the annual percentage rate required by the Truth In Lending Act, if the debtor is required to establish or maintain a deposit account with the creditor for receipt of the debtor's tax refund to offset the amount owed on the loan, the maturity of the loan for the purpose of determining the annual percentage rate disclosure under this section shall be assumed to be the estimated date when the tax refund will be deposited in the debtor's account.

§ 53-250. Prohibited activities.

A facilitator of a refund anticipation loan may not engage in any of the following activities:

(1) Misrepresenting a material factor or condition of a refund anticipation loan.

(2) Failing to arrange for a refund anticipation loan promptly after the debtor applies for the loan.

(3) Engaging in any transaction, practice, or course of business that operates a fraud upon any

person in connection with a refund anticipation loan.

(4) Facilitating a refund anticipation loan for which the refund anticipation loan fee is (i) different from the fee posted or the fee filed with the Commissioner or (ii) in an amount that the Commissioner has notified the facilitator is unconscionable.

(5) Directly or indirectly arranging for payment of any portion of the refund anticipation loan for check cashing, credit insurance, or any other good or service unrelated to (i) preparing and filing tax returns or (ii) facilitating refund anticipation loans.

(6) Arranging for a creditor to take a security interest in any property of the debtor other than the proceeds of the debtor's tax refund to secure payment of the loan.

§ 53-251. Cease and desist; revocation of registration; penalties.

(a) Cease and Desist Order. Upon the finding that any action of a registrant may be in violation of this Article or that the registrant has engaged in an unfair or deceptive act or practice, the Commissioner shall give reasonable notice to the registrant of the suspected violation or unfair or deceptive act or practice, and an opportunity for the registrant to be heard. If, following the hearing, the the Commissioner finds that an action of the

registrant is in violation of this Article or that the registrant has engaged in an unfair or deceptive act or practice, the Commissioner shall order the registrant to cease and desist from the action.

If the registrant fails to appeal a cease and desist order of the Commissioner in accordance with G.S. 53-252 and continues to engage in an action in violation of the Commissioner's order to cease and desist from the action, the registrant shall be subject to a penalty of one thousand dollars ($1,000) for each action it takes in violation of the Commissioner's order.

(b) Revocation of Registration. After notice and hearing, and upon the finding that a registrant has (i) engaged in a course of conduct that is in violation of this Article or (ii) continued to engage in an action in violation of a cease and desist order of the Commissioner that has not been stayed upon application of the registrant the Commissioner may revoke the registration of the registrant temporarily or permanently in the discretion of the Commissioner.

(c) Civil Penalties. Except in the case of a refund anticipation loan that is not approved by the creditor, a facilitator who fails to deliver to the debtor the proceeds of a refund anticipation loan within 48 hours after the time period promised by the facilitator when the debtor applied for the loan shall pay to the debtor an amount equal to the refund anticipation loan fee. A facilitator who engages in an activity prohibited under G.S. 53-250 in connection with a refund anticipation loan is liable to the debtor for damages of three times the amount of

the refund anticipation loan fee or other unauthorized charge plus a reasonable attorney's fee.

§ 53-252. Appeal of Commissioner's decision.

Notwithstanding any other provision of law, an aggrieved party may, within 30 days after a final decision of the Commissioner and with written notice to the Commissioner, appeal the decision directly to the North Carolina Court of Appeals for judicial review on the record. In the event of an appeal, the Commissioner shall certify the record to the Clerk of the Court of Appeals within 30 days after receipt of notice of appeal. The record shall include all memoranda and briefs, and any other documents, data, information, or evidence submitted by any party to the proceeding except for material such as trade secrets normally not available through commercial publication for which a party has made a claim of confidentiality and requested exclusion from the record. All factual information contained in any report submitted to or obtained by the Commissioner's staff shall also be made a part of the record unless deemed confidential by the Commissioner.

§ 53-253. Rules; enforcement.

Notwithstanding the provisions of G.S. 53-95, the Commissioner may promulgate reasonable rules as necessary to effectuate the purpose of this Article, to provide for the protection of the borrowing public, and to assist registrants in interpreting this Article. In order to enforce this Article,

the Commissioner may make investigations, subpoena witnesses, require audits and reports, and conduct hearings regarding possible violations of its provisions.

§ 53-254. Exemption.

This Article does not apply to a person who does not deal directly with debtors but who acts solely as an intermediary by processing or transmitting, electronically or otherwise, tax or credit information or by preparing for a facilitator refund anticipation loan checks to be delivered by the facilitator to the debtor.

Supreme Court, U.S.
FILED
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No. 93-378

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

NORTH CAROLINA ASSOCIATION OF ELECTRONIC TAX FILERS, INC. AND ROCKET REFUND,
Petitioners,

v.

WILLIAM T. GRAHAM, COMMISSIONER OF BANKS, NORTH CAROLINA BANKING COMMISSION,
Respondent.

On Petition For A Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF IN OPPOSITION

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No. 93-378

In The
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WILLIAM T. GRAHAM, COMMISSIONER OF BANKS, NORTH CAROLINA BANKING COMMISSION,
Respondent.

On Petition For A Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

The petitioners filed their complaint in the Superior Court of Wake County, North Carolina, on January 2, 1992. The petitioners sought to enjoin the respondent, the North Carolina Commissioner of Banks, from enforcing the North Carolina Refund Anticipation Loan Act, N.C. Gen. Stat.

§ 53-245 *et seq.* The petitioners contended that the Act was unconstitutional because it violated the Supremacy Clause and the Commerce Clause of the U.S. Constitution.

The petitioners' motion for a preliminary injunction was denied on January 8, 1992. The petitioners then moved for summary judgment and a permanent injunction. On February 14, 1992, the Superior Court denied the petitioners' motion for summary judgment and awarded summary judgment to the Commissioner of Banks.

The petitioners appealed and petitioned for discretionary review by the Supreme Court of North Carolina. The North Carolina Supreme Court granted discretionary review. On May 7, 1993, the Court filed its opinion, unanimously holding that the North Carolina Refund Anticipation Loan Act does not violate the Supremacy or Commerce clause of the U.S. Constitution. *N.C. Association of Electronic Tax Filers, Inc. v. Graham,* 333 N.C. 555, ___S.E.2d _____.

The petition for a writ of certiorari was filed on September 7, 1993 and was received by the respondent on September 9.

B. FACTUAL BACKGROUND

The North Carolina Refund Anticipation Loan Act, N.C. Gen. Stat. §§ 53-245 to 53-254, was enacted by the N.C. General Assembly in 1990, with an effective date of October 1, 1990. The Act represented a legislative initiative to give the N.C. Commissioner of Banks some regulatory

oversight over the marketing of consumer loans which are secured and repaid by future tax refunds. The Act requires those who offer and arrange refund anticipation loans ("RAL's") to register with the Commissioner of Banks and to make specified disclosures to consumers regarding the costs and time frames for the loans. The Act does not regulate rates but does prohibit unconscionable fees.

The Act was the result of a deliberative legislative process involving input and cooperation from representatives of the tax preparation industry, banks, state regulators, low-income consumers and the Internal Revenue Service. In 1991, over 400 refund anticipation loan offices were registered by the Banking Commissioner's office. At the time the plaintiffs' lawsuit was filed at the beginning of the 1992 tax return season, over 500 applications were pending at the Commissioner's office.

The recent growth of refund anticipation lending is largely due to the advent of electronic filing of federal tax returns. Through electronic filing, a taxpayer can file a "paperless" return with the IRS using computer access. If a refund is due, the IRS can electronically deposit the return in the taxpayer's designated bank account, usually within 2-3 weeks of filing the return. Taxpayers can and do file returns electronically without applying for refund anticipation loans.

A refund anticipation loan is a short-term, high interest consumer loan that is repaid with the proceeds of the borrower's tax refund. In the typical transaction, the RAL facilitator (which could be a tax preparer, a convenience

store or a pawn shop) takes tax return information and a loan application from the consumer. The facilitator arranges for the electronic transmission of the tax return to the IRS and the transmission of the loan information to a lending institution that issues RAL's. (The transmission is often handled by a separate service bureau since many RAL facilitators do not have their own electronic filing capacity.) If the loan is approved, the consumer can pick up his loan check from the facilitator in 3-5 days. The loan proceeds will be in the amount of the anticipated tax refund, less fees and finance charges. The loan is repaid when the actual tax refund is transmitted to the consumer's "deposit account" at the lending bank, usually within 2-3 weeks.

The North Carolina Refund Anticipation Loan Act regulates the RAL originators or "facilitators" who typically handle the solicitation, application and information transmittal for RAL's and often disburse the loan proceeds to the borrower. The facilitator is the local entity which has the only direct contact with the consumer borrower in the RAL process.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Allowing the writ of certiorari is not appropriate in this case. The petitioners' constitutional claims are insubstantial and are based on erroneous factual premises.

The North Carolina Supreme Court thoroughly reviewed the petitioners' constitutional challenges to the North Carolina Refund Anticipation Loan Act ("RAL Act")

and upheld the constitutionality of the Act. The Court concluded that 1) there was no evidence of a federal statutory or regulatory scheme to preempt state legislation on RAL's; and 2) the Act serves an important local purpose while imposing only an incidental burden on interstate commerce. In reaching its conclusions, the Court correctly applied precedent from U.S. Supreme Court decisions on preemption and interstate commerce. Despite the petitioners' contentions, there is no conflict between the North Carolina Supreme Court's decision and any decision of this Court.

Before reaching the constitutional issues in this case, it is essential to recognize that the RAL Act does not regulate the electronic filing of tax returns. It regulates only those who solicit or arrange tax refund anticipation loans. The relationship between refund anticipation loans and the electronic filing of tax returns can best be characterized as a parasitic one. The rapid development of refund antiticpation lending has been facilitated by the speed of electronic filing and electronic direct deposit but RAL's are still exclusively private sector credit transactions.

The petitioners mischaracterize the scope of the Act in order to advance their constitutional argument. For example, the petitioners assert that the N.C. RAL Act "constitutes a direct barrier to the participation by tax preparers in the national program of electronic filing of tax returns." (Petition, p. 11). The petitioners go on to claim that a tax preparer "may be approved by the Internal Revenue Service to do electronic filing, and yet be precluded from doing so by the N.C. Act." *Id.* These assertions are

wrong. A tax preparer can qualify as an electronic tax filer without any reference to the RAL Act. If the IRS approves an electronic tax filer, that person is free to electronically file returns without registering under the RAL Act. It is only when the electronic filer offers to arrange loans that compliance with the RAL Act is mandated.

I. THE NORTH CAROLINA SUPREME COURT CORRECTLY HELD THAT THE REFUND ANTICIPATION LOAN ACT DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE THE ACT DOES NOT REGULATE OR INTERFERE WITH THE FEDERAL TAX SYSTEM.

A. Introduction: The Petitioners' Preemption Claim Is Based Upon A Faulty Premise That Disregards The Fact That Refund Anticipation Loans Are Private Loan Transactions Outside The Scope of IRS Regulation And Control.

The Petitioners contend that the Refund Anticipation Loan Act intrudes upon the Internal Revenue Service's exclusive jurisdiction over the federal tax system. They cite numerous decisions for the proposition that, when a federal agency has been given comprehensive regulatory authority in an area, the states are preempted from legislating in that same area. The problem with the petitioners' argument is

that the facts of this case do not apply to their preemption argument.

The simple response to the petitioners' claim is that the N.C. Refund Anticipation Loan Act does not regulate, interfere with, or intrude upon the filing, collection or refunding of federal taxes. The Act applies only to the offering and arranging of consumer loans. The IRS regulates taxation, not lending. If the state Act did impinge on the IRS's exclusive jurisdiction over federal taxation, the IRS no doubt would have protested loudly. However, the record in this case contains an affidavit from the North Carolina District Director of the IRS in which he states that the IRS has no quarrel with the Act. Internal Revenue Procedure 90-62, which was the sole basis for the petitioners' preemption claim, also clearly states that the IRS has "no involvement" with refund aniticipation loans. Revenue Procedure 90-62, Sec. 10.01, *Handbook for Electronic Filers*, p. 94 (July, 1991). The current version of this Revenue Procedure, Rev. Proc. 93-8, contains the same language disclaiming regulatory interest over RAL's.

The petitioners blur the distinction between the electronic filing of tax returns, which is a procedure exclusively governed by the IRS, with refund anticipation loans, which are private commercial transactions not controlled by the IRS. It is important to recognize that a tax service or other entity can offer electronic filing of tax returns without compliance with the Refund Anticipation Loan Act and without any oversight by the Commissioner of Banks. A taxpayer can have his federal return electronically

filed and his refund direct deposited into his bank account within two to three weeks without a loan and without the Refund Anticipation Loan Act coming into play.

B. THERE IS NEITHER PERVASIVE FEDERAL REGULATION OF THE FIELD OF REFUND ANTICIPATION LENDING NOR ACTUAL CONFLICT BETWEEN THE STATE REFUND ANTICIPATION LOAN ACT AND THE FEDERAL ADMINISTRATION OF THE TAX SYSTEM.

The preemption doctrine has been set forth in a number of modern decisions of this Court, beginning with *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). The North Carolina Supreme Court correctly summarized the current test, citing the following passage from *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986):

> In determining whether Congress has invoked this pre-emption power, we give primary emphasis to the ascertainment of congressional intent. This may be manifested in several ways. Chief among the indications of an intent to pre-empt is where Congress has legislated so comprehensively that it has left no room for supplementary state legislation. Pre-emption may also be found where state legislation would impede the purposes and objectives of Congress. In undertaking this analysis, however, we must be mindful of the principle that "federal regulation of a field of

> commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

The petitioners contend that they have satisfied both the "field preemption" and "conflict preemption" tests. They argue that the federal government has occupied the field by comprehensively regulating refund anticipation loans and that the Refund Anticipation Loan Act imposes an obstacle to the Internal Revenue Service's ability to accomplish its congressional mandate.

The petitioners' basic argument is that because RAL's touch upon an area regulated by the IRS, any state regulation of them is preempted. Since there is no mention of preemptive intent regarding RAL's in the federal tax code or regulations, the petitioners depend on an inference of preemption from the brief discussion of RAL's in one section of an IRS Revenue Procedure.

A well-established line of Supreme Court cases, however indicates that there is strong presumption against a finding of preemption. As the Court stated in *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 413 (1973):

> This Court has repeatedly refused to void state statutory programs, absent congressional intent to preempt them..."It will not be

> presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." (citation omitted).

The presumption against preemption is particularly compelling if the area is one traditionally regulated by the states. *California v. Arc America Corp.*, 490 U.S. 93, 101 (1989). Regulation of consumer credit and protection against deceptive trade practices are, of course, matters of traditional state concern. Absent a clear and unambiguous congressional mandate to the contrary, the assumption is that the historic police powers of the states are not to be superseded by federal legislation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963). The party claiming preemption has the burden of demonstrating, with specificity, the federal intention to preempt. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

The mere fact of some federal regulation of an area does not lead to a finding of preemption. Federal and state regulations over the same area, particularly in commerce, can and do co-exist. The test is "whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. at 142. See also *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572,

582-583 (1987). (Intent to preempt in federal regulations must be stated "with some specificity.")

The instant case does not require a sophisticated application of the preemption doctrine. The facts simply do not support a preemption claim. There is no pervasive federal regulation of refund anticipation loans nor is there a "clear and manifest" congressional or regulatory intent to "occupy the field."

The petitioners have not pointed to any express congressional intent with respect to refund anticipation loans because there is none. There is no federal statute that even mentions refund anticipation loans. The only federal statutory authority petitioners cited in the proceedings below was 26 U.S.C. § 6011(e) which simply authorizes the Secretary of Treasury to prescribe "regulations providing standards for determining which returns must be filed on magnetic media or in other machine-readable form." The petitioners now cite federal statutes and regulations governing third party tax preparers, e.g., 26 U.S.C. §§ 6694-6696. However, these statutes and regulations have nothing to do with refund anticipation loans. One does not have to be a tax preparer to arrange refund anticipation loans and one can register as a RAL facilitator under the N.C. RAL Act without having any tax preparation expertise.

The only specifically relevant authority for the petitioner's claim of pervasive federal regulation is found in

Revenue Procedure 93-8 (effective January 1, 1993).[1] Of course, IRS Revenue Procedures do not have the force and effect of the Internal Revenue Code or Treasury Regulations. They are intended to provide informal guidance to the public. See *Caterpillar Tractor Co. v. United States*, 589 F.2d 1040, 1043 (U.S. Ct. Cl. 1978). Revenue Procedure 93-8 contains guidelines for participation in the electronic filing program and includes one section (Sec. 10) relating to refund anticipation loans. That section does have some minimal regulations for electronic filers who arrange RAL's. These pertain to legitimate IRS tax concerns, including a requirement for consent by the taxpayer for disclosure of tax refund information to the RAL lender and a prohibition on guarantees as to the date or amount of the tax refund.

Section 10.01 also clearly states:

> The Service has no involvement in RALs. This is a contract between the taxpayer and the lender.

This statement is hardly a clear manifestation of federal intent to occupy the field of regulating tax refund anticipation lending. It falls far short of any Supreme Court test relating to preemptive intent. By itself, it ought to be sufficient to

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[1] In the proceedings below, the petitioners relied on Rev. Proc. 90 62 which was superseded by Rev. Proc. 91-69. The North Carolina Supreme Court reviewed Rev. Proc. 91-69 in its opinion. The current version, Rev. Proc. 93-8, is substantially similar to the prior versions, especially in its disclaimer of regulatory intent over RAL's.

end the inquiry and put to rest the petitioners' overblown attempts to create a preemption case.

The petitioners' other preemption claim -- that the N.C. Act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Internal Revenue Service -- is also deficient in its basic premise. The IRS has a legitimate objective in assuring an efficient process of tax filing, including electronic filing. The state RAL Act does not interfere with this objective because it does not impose any regulations or qualifications on tax return filing. It is difficult to see how simple registration and minimal consumer disclosure requirements for RAL facilitators impede the IRS.

The record contains affidavits of the present and former North Carolina District Directors of the Internal Revenue Service. Both affidavits show that the IRS does not regard the N.C. Act as an impediment to any aspect of the internal revenue system. The petitioners' argument is directly refuted by the following statement of District Director J.R. Starkey:

> Neither that statute [the RAL Act] nor the administration of it by the North Carolina Commissioner of Banks has interfered with the Internal Revenue Service's electronic filing program. It appears that the statute has not hindered or impeded electronic filing and is not inconsistent with the Internal Revenue

> Service's goal of a smooth and efficiently run electronic filing program.

In fact, as Mr. Starkey's affidavit states, North Carolina led the nation in numbers of electronically-filed returns in tax-filing year 1991 (the first year the RAL Act was in effect).

The petitioners' preemption argument does not comport with the factual setting of this case. The petitioners have attempted to advance a regulatory position on behalf of the IRS when the IRS has clearly rejected that position. The respondent agrees with the petitioners' contention that the IRS has the exclusive control over the manner of filing federal tax returns. But this case is not about taxation, it is about refund anticipation lending. Clearly, there is no national comprehensive regulatory scheme over refund lending as petitioners claim. North Carolina is free to act in this area, as it traditionally has acted in the area of consumer credit, and the minimal requirements of the RAL Act are a legitimate exercise of legislative authority.

II. THE NORTH CAROLINA SUPREME COURT CORRECTLY HELD THAT THE REFUND ANTICIPATION LOAN ACT IS A LEGITIMATE EXERCISE OF NORTH CAROLINA'S POLICE POWER WHICH IMPOSES A MINIMAL BURDEN ON INTERSTATE COMMERCE.

A. The Refund Anticipation Loan Act Does Not Regulate Or Interfere With The Operation Of Out-of-State National Banks.

The N.C. Supreme Court thoroughly reviewed and properly dismissed the petitioners' Commerce Clause argument. The Court found that the Act furthered important state objectives. These included consumer protection disclosures to ensure that taxpayers know: 1) the difference between an RAL and a tax refund; 2) that tax returns can be filed electronically without a loan transaction; and 3) the true costs of an RAL. The Court held that the Act did not directly regulate interstate commerce and that it did not favor in-state over out-of-state economic interests. Finally, the Court concluded that as a simple registration and disclosure statute, the Act imposed only a minimal burden on interstate commerce. The Act, therefore, met this Court's interstate commerce test set forth in *Brown-Forman Distillers Corporation v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986).

The petitioners argue that the RAL Act regulates and significantly interferes with national banking transactions

outside the borders of North Carolina. There are several serious flaws to the petitioners' claim. First, the RAL Act does not regulate national banks. In fact, banks are expressly exempt from the Act's coverage. N.C. Gen. Stat. §§ 53-247(c) and 53-254.

Second, the petitioners are not banks. They do not have standing to assert the legal interests of non-party national banks. If the legal or economic interest of out-of-state national banks were seriously affected, surely those banks would have pressed their claims directly.

Third, there is no requirement of national uniformity in the area of refund anticipation lending. No federal banking statutes address refund anticipation loans. As with consumer credit regulation generally, regulation of RAL's is appropriately a matter for individual states. The North Carolina Consumer Finance Act, N.C. Gen. Stat. § 53-164 *et seq.* (which regulates small loans under $10,000) and the North Carolina Retail Installment Sales Act, N.C. Gen. Stat. § 25A-1 *et seq.* (which regulates retail credit) are examples of typical consumer credit statutes common to most states. The RAL Act fits within this well-established tradition among the states of protecting consumers from oppressive credit practices.

Fourth, there is absolutely no support in the record for the proposition that the Act has served as a "substantial impediment" to interstate lending transactions (Petition, p. 46). In fact, it appears that refund anticipation lending has prospered in this state. The petitioners' contention that the

regulatory authority given the Commissioner of Banks by the Act "directly infringes on the ability of national banks to sustain themselves by engaging in regional and national lending" (Petition, p. 51) is ludicrous. The petitioners have not produced any evidence of any negative impact the RAL Act has had on any national bank.

B. THE REFUND ANTICIPATION LOAN ACT DOES NOT INTERFERE WITH THE UNIFORM OPERATION OF THE FEDERAL TAX SYSTEM.

As an additional Commerce Clause argument, the petitioners contend that the RAL Act undermines the uniformity of the federal tax system. Citing *Cooley v. Board of Wardens*, 53 U.S. 299 (1851) and *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), the petitioners correctly state that where there is federal regulation of an area of commerce, and a need for uniformity of regulation, the states should not interfere.

The respondent agrees with the petitioners that there is a need for uniform federal regulation of federal taxation, free from state interference. However, as discussed above, the state RAL Act does not regulate federal taxation. Nor, as IRS Revenue Procedure 93-8 makes clear, does the IRS claim exclusive regulatory authority over RAL's. Where there is no federal exclusivity, and no state interference with the federal domain, there can be no Commerce Clause problem.

Secondly, federal taxation is not commerce. The petitioners' attempt to bootstrap a Commerce Clause

argument on the exclusivity of federal tax regulation must therefore fail. Refund anticipation lending is commerce. However, there is no uniform system of federal regulation (or any federal regulation) of refund anticipation lending.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully Submitted,

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No. 93-378

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NORTH CAROLINA ASSOCIATION OF
ELECTRONIC TAX FILERS, INC. AND
ROCKET REFUND, INC.,
Petitioners,

vs.

WILLIAM T. GRAHAM,
COMMISSIONER OF BANKS,
NORTH CAROLINA BANKING COMMISSION,
Respondent.

On Petition For A Writ of Certiorari To The
Supreme Court of North Carolina

REPLY MEMORANDUM FOR THE PETITIONERS

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REPLY MEMORANDUM FOR THE PETITIONERS

I. THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING PRE-EMPTION.

In its Brief in Opposition, Respondent argues to this Court that refund anticipation loans are private consumer loans that have nothing to do with the Internal Revenue Service's jurisdiction over taxation. This is not the case. Refund anticipation loans are solely a creation of the Internal Revenue Service. They do not exist outside the Internal Revenue Service's Electronic Filing Program.

Millions of Americans are presently participating in this program for the main reason of receiving their tax refunds within a few days of electronically filing their federal income tax returns. The entire Electronic Filing Program of the Internal Revenue Service, including the regulation of tax refund loans, was adopted in an effort to more quickly and efficiently aid the Internal Revenue Service in collecting taxes and providing refunds to taxpayers.

North Carolina's effort to intrude upon the field of federal income taxation through the North Carolina Refund Anticipation Loan Act is a clear violation of the Supremacy clause of the United States Constitution. The North Carolina Refund Anticipation Loan Act is in direct conflict with this Court's decisions in United States v. Snyder, 149 U.S. 210 (1893) and Lyeth v. Hoey, 305 U.S. 188 (1938). Congress has provided for uniformity in federal income tax policy, including refunds, and the states are prohibited from interfering with the federal income tax system. The issue here is whether federal tax refunds are in any way regulated by Congress. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). The answer is clearly in the affirmative. Congress has left no room for the states to intrude in this area.

With regard to conflict pre-emption, this Court in Gade v. National Solid Wastes Management Ass'n, 112 S. Ct 2374 (1992), reaffirmed that state law cannot stand as an obstacle

to the accomplishment and execution of the full purposes of Congress. In order to make this determination, this Court is not to be guided by legislative labels and purported purposes. As stated in Hughes v. Oklahoma, 441 U.S. 332 (1979), "when considering the purpose of a challenged statute, this court is not bound by '[t]he name, description or the characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law." Id. at 336 (quoting Lacoste v. Louisiana Dept. of Conservation, 263 U.S. 545, 550 (1926)).

This Court has traditionally applied a thorough, in-depth analysis of state statutes, the primary focus of which is to determine the effect of the statutes. The "effect rather than the purpose of a state statute governs pre-emption analysis," International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (citing Perez v. Campbell, 402 U.S. 637 (1921). See also Healy v. Beer Institute, Inc., 109 S. Ct. 2491, 2499 (1989); and Wyoming v. Oklahoma, 112 S. Ct. 789, 801 (1992). In

Gade, this Court further stated: "[i]n assessing the impact of state law on a federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law. Gade at 2387.

Respondents would have the Court examine only the title and purported purpose of the North Carolina Refund Anticipation Loan Act, (hereinafter NCRALA). Such an analysis is not only simplistic, but also is contrary to the conflict preemption "effects" analysis which has been employed by this Court for decades, including a reaffirmation just two terms ago in Gade.

Petitioner's arguments are based upon the practical effects of the statute or as this Court in Gade stated: "the impact of the state law." The practical impact or effect of the NCRALA statute is to create not only obstacles, but impenetrable barriers to the "accomplishment and execution of the full purposes and objectives of Congress" as expressed by the Congress in the Internal Revenue Code and by the Internal

Revenue Service in its Regulations and Procedures:

> No person may individually or in conjunction or cooperation with another person process, receive or accept for delivery...a check in payment of refund anticipation loan proceeds without first being registered with the Commissioner.

N.C.G.S. section 53-247 (emphasis added).

In support of its proposition that the Act does not impinge upon federal taxation, the respondent bases its argument primarily on the affidavits of two local directors of the Service. However, the primary method for determining when a state statute "stands as an obstacle to the accomplishment and execution of the full purposes of Congress" is by determining the intent of Congress.

Using this Court's analysis to examine relevant statutory authority demonstrates how Congress has granted full authority to the Secretary of the Treasury to make federal tax refunds. Title 26 U.S.C. section 6402 (a) states:

> Authority to make credits or refunds. (a) General rule. In the case of any overpayment, the Secretary...on the part of the person who made the overpayment shall subject to subsections (c) and (d), refund any balance to such person.

Pursuant to the specific intent of Congress expressed in this statute, the Internal Revenue Service has promulgated regulations for the payment of refunds, including when individuals other than taxpayers can receive a taxpayer's refund.

Included in these regulations is a section specifically dealing with the endorsement, payment and deposit of United States Treasury checks. Also included in these regulations are the provisions for the deposit of Treasury checks in "financial institutions:"

The regulations state:

> A power of attorney is required by the Internal Revenue Service when the taxpayer wishes to authorize a recognized representative to perform one or more of the following acts on behalf of the taxpayer-

....

(5) Check drawn on the United States Treasury. The authority to receive (but not endorse or collect) a check drawn on the United States Treasury must be specifically granted in the power of attorney. (The endorsement and payment of a check drawn on the United States Treasury are governed by Treasury department circular No. 21, as amended, 31 CFR part 240. Endorsement and payment of such check by any person other than the payee must be made under one of the special powers of attorney prescribed by Circular No. 21, 31 CFR part 240.

26 CFR 601.504(a)(5)

The Code of Federal Regulations states:

PART 240 -- ENDORSEMENT AND PAYMENT OF CHECKS DRAWN ON THE UNITED STATES TREASURY

....

Section 240.11 Endorsement by payees

(a) General requirements. Checks shall be endorsed by the payees as set forth.

Thus, the endorsement and payment of the United States Treasury checks are solely and completely governed by the

regulations established by the Treasury department.

The primary purpose of the above cited sections is to allow financial institutions to receive taxpayer refunds directed to these institutions by the taxpayer through the system of Direct Deposit. The Internal Revenue Service specifically allows only those taxpayers who use electronic filing to file Form 8453, "U.S. Individual Income tax declaration for electronic filing," refund in any "financial institution" designated by the taxpayer. The regulations provide:

> (c) Checks endorsed by another on behalf of the named payee or payees--
>
> (1) Acceptable endorsement. The only acceptable endorsement of a check by another on behalf of a named payee or payees (except when a check is endorsed by a financial institution under the payee's or payee's authorization)
>
> ....
>
> (d) Endorsement of checks by a financial institution under the payee's authorization. When a check is credited by a financial institution to the payee's account under the payee's or payee's authorization, the

> financial institution may use [the following] endorsement.

31 CFR 240.11 (emphasis added).

Simply by filling out a form the taxpayer chooses which financial institution receives his deposit. When an electronic filer requests an RAL from a financial institution, that institution requires the taxpayer to file a Form 8453. This Form authorizes the institution making the RAL to accept the refund under 31 CFR 240.11. States are not authorized nor allowed to interfere with the issuance or deposit of Treasury Checks (i.e. refund checks). The regulations provide how the checks are deposited, 26 CFR 601.504(a)(5), how they are endorsed, 31 CFR 240, how the taxpayer must designate a financial institution, Form 8453, and most importantly, which "financial institution" is to receive the check, Form 8453.

There are no provisions for states to regulate the taxpayer choice of which financial institution will receive his or her refund. However, the NCRALA, by plain meaning

and strict construction, can and does regulate which institutions receive refunds and limits the taxpayer's federally designated choice.

The NCRALA states:

> **No person may...receive or accept for delivery...a check in payment of refund anticipation loan proceeds without first being registered with the Commissioner...**

N.C.G.S. section 53-247

This portion of the NCRALA places severe obstacles pertaining to the "accomplishment and execution of the full purposes of Congress." The act establishes barriers between the taxpayer and the choices which the Federal regulations and IRS Forms authorize. The NCRALA does this by allowing the state of North Carolina (the Banking Commissioner) to act as a gatekeeper. The act prevents a taxpayer designated institution from receiving refunds, which as the respondent admits are "in payment of refund anticipation proceeds." ("The loan proceeds will be the amount of the anticipated tax

refund, less fees and finance charges.") The loan is repaid when the actual tax refund is transmitted to the taxpayer's deposit account' at the lending bank. Failure to comply with the NCRALA can result in criminal penalties.

Respondent contends that the Act is protection against unfair trade practices. However, respondent overlooks the fact that the Internal Revenue Service requires a taxpreparer to charge a flat fee to assist a taxpayer in applying for an RAL. It must be the same for all taxpayers, and cannot be related to the amount of the refund or RAL. (Rev. Proc. 93-8, Sec. 10.04). The Internal Revenue Service has also set up detailed rules for suspending taxpreparers who violate the rules. (Rev. Proc. 93-8, Sec. 13). North Carolina cannot set up additional hurdles for tax preparers in the Electronic Filing Program when they have met the requirements of the Internal Revenue Service. See Rice v. Santa Fe Elevator Corp., supra. at 236.

II. THE NORTH CAROLINA REFUND ANTICIPATION LOAN ACT IS UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT THE EFFECT OF THE ACT IS TO CONTROL NATIONAL BANKING TRANSACTIONS BEYOND THE STATE'S BORDERS AND TO UNDERMINE UNIFORMITY OF REGULATION.

The respondent contends that the NCRALA does not apply to "financial institutions," because the NCRALA was drafted to exclude a person doing business as a "bank, savings association, or credit union...." The respondent fails to recognize the impact of the NCRALA on national banking transactions. Under the Treasury regulations which govern the deposit of refund checks, a financial institution is "any bank, savings bank, savings and loan association, Federal or State chartered credit union, or any other similar institution." 31 CFR part 240.2(f).

Moreover, these institutions cannot receive taxpayer's refunds as provided for by extensive Federal regulations, forms, and procedures of the IRS. Such a result is an

infringement on the comprehensive congressionally mandated system. Therefore, the effect of the NCRALA is to relegate and subvert a whole system of Treasury regulations, the system of Direct Deposit, and Internal Revenue Service tax forms, to nothing more than meaningless words unless the North Carolina Banking Commissioner gives his approval for these financial institutions to receive "a check in payment of a refund anticipation loan."

The respondent's analysis of this issue is cursory and superficial. The "effects" analysis sufficiently shows how the NCRALA places substantial barriers and obstacles on taxpayers, electronic filers and financial institutions, so that the "accomplishment and execution of the full purposes of Congress," as expressed in the United States Code and the Code of Federal regulations, cannot be realized.

Respondent attempts to base his lack of congressional intent on seventeen words, from a revenue procedure which consists of thousands of words, and hundreds of sentences.

From these statements, "[t]he Service has no involvement in RAL's" and "[t]his is a contract between the taxpayer and the lender," the respondent reaches his conclusion that: "[t]his statement is hardly a clear manifestation of federal intent to occupy the field of regulating the field of tax refund anticipation lending."

The respondent fails to comprehend the legislative intent set out in 26 U.S.C. 7805. The Secretary has acted in relation to refund anticipation loans. More importantly, the Secretary has not "expressly given" North Carolina any authority to subvert the carefully chosen and intricately designed system for the filing of electronic information, regulating who can file electronic information, or attempting to interfere with the system designed by the IRS to deposit taxpayers refunds into financial institutions of their own choosing.

The Revenue statement emphasized by the Respondent "[t]hat the Service has no involvement in RAL's," merely

states a truism of contract law, i.e. that the parties are free to bargain over contract terms. What the statement does not mean, is that the IRS will give up control of its systems and methods of revenue collection and refund payments. If the Respondent had set forth the entire Section, in context, dealing with RAL's, the intent of the Service to control the interrelationship of RAL's with the uniform system of dispersement and collection would be clear. The Internal Revenue Service does not make refund anticipation loans, but it regulates them. NCRALA forces electronic transmitters who assist taxpayers to submit to the Act or else be subject to criminal penalties.

The respondent contends that the petitioners do not have standing to raise the issue of the effect of the NCRALA on out-of-state national banks. This argument of standing was never raised below, and therefore, is not properly before this Court. The respondent in its Answer stipulated that the tax refund loans are all done by out-of-state national banks. No

North Carolina Banks are involved in this process.

Finally, the respondent ignores the exclusivity doctrine as it relates to the Commerce Clause. Respondent superficially states that federal taxation is not commerce. The respondent fails to comprehend that the entire process of the electronic filing of federal tax returns and refund loans is involved in interstate commerce. The national banks, the taxpreparers, and the taxpayers are all involved in a system which inextricably involves interstate commerce. The NCRALA undermines a federal tax system which was designed to be uniform, and to be a system exclusively controlled by the federal government.

CONCLUSION

The Writ of Certiorari should be granted because this case presents important and novel constitutional questions involving federal income tax and national banking policy. This case also presents compelling issues of national importance which effect millions of taxpayers.

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